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Kentucky Law Survey: Administrative Law

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ADMINISTRATIVE LAW

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I. THE STATE OF DE NOVO REVIEW IN KENTUCKY

The Kentucky appellate courts each decided cases in the past three years clarifying the availability and scope of "de novo" review of state administrative agency actions. These recent decisions illustrate that while Kentucky law largely retains the classic elements of traditional de novo review, it has also developed some unconventional qualities. Principally, these differences involve the burden of proof the Kentucky courts impose when review is de novo and the deference the Kentucky trial courts, as reviewing bodies, are to accord agency decisions.

Generally, "review of a decison of an administrative body is limited to determining whether the body's decision is supported by substantial evidence, or [put another way,] whether [the] decision is unreasonable or arbitrary."[1] When a statute permits,[2] however, the review of the administrative body's de-

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[1] Carter v. Craig, 574 S.W.2d 352 (Ky. Ct. App. 1978). Recent cases applying the substantial evidence rule in Kentucky include Hocker v. Fisher, 590 S.W.2d 342 (Ky. Ct. App. 1979); Hart County Bd. of Educ. v. Broady, 577 S.W.2d 423 (Ky. Ct. App. 1979); Williams v. Cumberland Valley Nat'l Bank, 569 S.W.2d 711 (Ky. Ct. App. 1978); Kirk v. Jefferson County Medical Soc'y, 577 S.W.2d 419 (Ky. Ct. App. 1978); and Louisville & N. R. Co. v. Department of Revenue, 551 S.W.2d 259 (Ky. Ct. App. 1977). Generally, these cases agree that "there is deference to the trier of facts and agency determinations are to be upheld if the decision is supported by substantial, reliable, and probative evidence found within the record as a whole." Hocker v. Fisher, 590 S.W.2d 342, 344 (Ky. Ct. App. 1979).

[2] Generally, de novo review is a creature of statute. Although no Kentucky case has expressly indicated that de novo review requires a statutory grant, no Kentucky case has allowed de novo review without benefit of a statutory grant. *But see* text accompanying notes 46-48 *infra* for a possible exception to this general statement. In Osborne v. Bullitt County Bd. of Educ. 415 S.W.2d 607 (Ky. 1967), the high Court of Kentucky cited language indicating that de novo review is a choice made by the legislature. The Court said: "A legislature should be free to assign them [questions for determination] first to an agency with trial de novo by a court rather than the usually limited appropriate review." 415 S.W.2d at 612 (citing L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 103 (1965)). *See also* 2 AM. JUR. 2d *Administrative Law* § 697

cision can be "de novo." A de novo review means "trying the matter anew the same as if it had not been heard before and as if no decision had been previously rendered."[3] Thus, the subsequent review is not a review of the previous hearing's record alone but is an independent review, unrestrained by any compelled deference to the agency decision.

A. Brady v. Pettit

In *Brady v. Pettit*,[4] the Kentucky Supreme Court clarified the initial question of precisely when review may be de novo.[5] *Brady* involved a discharged employee's demand for a trial de novo under the provisions of Kentucky Revised Statutes (KRS) section 67A.290, which expressly provides for de novo review.[6] The trial court, however, refused to hear the

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(1962).

Apparently, the statute need not directly state that "de novo review is available"; rather this right may be implied from the statute. In Carter v. Craig, 574 S.W.2d 352 (Ky. Ct. App. 1978), the court held that a statute provided for de novo review where it read:

> The teacher shall have a right to make an appeal both as to law and as to fact to the circuit court. . . . The court shall examine the transcript and record of the hearing before the board of education and shall hold such additional hearings as it may deem advisable, at which it may consider other evidence in addition to such transcript and record.

Id. at 354.

[3] *See* Louisville & Jefferson County Plan. & Zoning Comm'n v. Grady, 273 S.W.2d 563 (Ky. 1954); 2 AM. JUR. 2d *Administrative Law* § 698 (1962).

[4] 586 S.W.2d 29 (Ky. 1979). The petitioner raised a first amendment claim; however, the Court chose to dispose of the claims solely on procedural grounds. *Id.* at 31.

[5] The *Brady* case involved a former personnel director of the Lexington, Fayette County Urban Government who accused Mayor Foster Pettit of attempting to place "political allies" in jobs by manipulating the civil service rules. These statements were printed in a Lexington newspaper on three occasions, and the mayor subsequently filed charges under KY. REV. STAT. [hereinafter KRS) § 67A.280 (1980), which statute sets forth the standard and procedure for dismissal, suspension or reduction of urban county government employees. The Civil Service Commission determined that the personnel director had a duty to air his grievances with his superiors before publicly declaring the charges. The Commission concluded that the director had "undermined public faith in the personnel system and caused a disruption of communication between himself and other persons in the executive branch of government." Thereafter, the Commission discharged the director. 586 S.W.2d at 30.

[6] KRS § 67A.290 (1980) provides in part:

> (1) any employe of the urban-county government found guilty by the civil service commission of any charges as provided by KRS § 67A.280 . . . may appeal to the circuit court of the county in which the urban county govern-

case de novo and instead decided the case on the agency record.[7] The trial court's refusal to hear the case de novo was based on *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission.*[8] The Kentucky Supreme Court reversed the trial court's refusal to hear the case de novo, holding that the trial court's reliance on *American Beauty Homes* was misplaced.[9] *American Beauty Homes,* a 1964 zoning reclassification case,[10] had held that "statutes providing for trial de novo in circuit court of administrative matters decided by appropriate bodies violates the constitutional doctrine[11] of separation of powers."[12] The Court asserted in *American Beauty Homes* that a contrary decision would unjustifiably allow the legislature to impose an administrative duty on the courts.[13] The imposition of the zoning commission's "identical duties" upon the courts would make the initial proceedings before the commission "a mockery," and, in light of this presumed violation of the separation of powers doctrine, the novo proceeding was unconstitu-

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ment is located within thirty (30) days after such action becomes final . . . .

(2) Upon request in writing by the accused . . . the secretary of the civil service commission shall file a certified copy of the charges and the judgment of that body in the circuit court. Upon the transcript being filed, the case shall be docketed in the circuit court and tried de novo.

[7] 586 S.W.2d at 30.

[8] 379 S.W.2d 450 (Ky. 1964).

[9] 586 S.W.2d at 31.

[10] Appellant was the owner of a tract of land zoned for one family residential use only. He had sought to have this classification changed to a D-1 commercial district. The zoning commission had denied his request, and the circuit court, on a trial de novo under KRS § 100.057(2) (1971), had affirmed the holding of the commission. *See* American Beauty Homes Corp. v. Jefferson County Plan. & Zoning Comm'n, 379 S.W.2d 450 (Ky. 1964).

[11] The constitutional doctrine is most explicitly supported by section 27 of the Kentucky Constitution, which provides:

> The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy. To wit: those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

KY. CONST. § 27. *See also* 379 S.W.2d at 453.

[12] 586 S.W.2d at 31.

[13] 379 S.W.2d at 454.

tional.[14] The Supreme Court in *Brady*, however, held that subsequent decisions had drastically diminished the scope of *American Beauty Homes*.[15] Although the Court agreed that *American Beauty Homes* retained some usefulness in zoning cases,[16] the Court found that de novo hearings may be required without impairing the separation of powers requirement.[17] The Court did not explain why, if it did not violate the separation of powers requirement, the *American Beauty Homes* standard was still useful in zoning cases.

The Court's limitation of the *American Beauty Homes* doctrine to zoning cases may reflect a belief that the zoning area is one, in particular, where the courts should pay more deference to the administrative body involved. Zoning classifications involve matters affecting the whole community and are, therefore, in many cases, more quasi-legislative in nature than are employee discharges. A dispute between a discharged employee and a discharging agency has a much smaller degree of impact on the community as a whole and typically involves issues of a quasi-adjudicative nature. A perhaps comparable distinction is that between determinations of "legislative fact" (used to make public policy decisions) and determinations of "adjudicative fact" (used to make decisions on individual rights). This distinction is used to determine whether a party has a right to a trial-type hearing before an administrative agency in the first place.[18] Considerations that make a trial

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[14] *Id.* at 455.

[15] 586 S.W.2d at 31. *See generally* City of Glasgow v. Duncan, 437 S.W.2d 199 (Ky. 1969); Story v. Simpson County Bd. of Educ., 420 S.W.2d 578 (Ky. 1967); Osborne v. Bullitt County Bd. of Educ. 415 S.W.2d 607 (Ky. 1967); Kilburn v. Colwell, 396 S.W.2d 803 (Ky. 1965).

[16] "[W]e conclude that *American Beauty Homes* now applies only to zoning matters and *matters of like nature*. A separate rule of law in de novo situations has developed in situations involving the discharge of teachers, policemen, firemen, and the like." 586 S.W.2d at 31 (emphasis added). The court gave no indication of what constitutes "matters of like nature."

[17] The court relied in part on Osborne v. Bullitt County Bd. of Educ., 415 S.W.2d at 607. That case foreshadowed the *Brady* decision by holding that *American Beauty Homes* was limited to "zoning" and "other administrative acts" and implied that public employees would operate within the confines of the *City of Owensboro v. Noffsinger* standard, discussed below. See text accompanying notes 19-27 *infra* for a discussion of the *Noffsinger* standard.

[18] *Compare* Londoner v. Denver, 210 U.S. 373 (1908) *with* Bi-Metallic Inv. Co. v.

type hearing inappropriate for quasi-legislative determinations may also make de novo court review inappropriate for such determinations.

The court in *Brady* also made clear what de novo review really means in Kentucky. The court reaffirmed its confidence in a "preponderance test," as stated in the earlier Kentucky case of *Owensboro v. Noffsinger,*[19] and outlined the effect of de novo review on the burden of proof. *Noffsinger,* relying on prior case law,[20] had stated that the standard of review is:

> not whether the administrative decision finds reasonable support in substantial evidence, but whether or not the circuit court, hearing witnesses anew, acting as a fact-finding body, from a consideration of all the evidence heard in the circuit court, is of the opinion that the evidence heard in the circuit court preponderates against the decision made by the commission.[21]

The high Court had more recently stated that this test of preponderance has "the practical effect . . . [of] shifting the burden of proof to the appealing party, which means that the review is something less than purely de novo."[22] If review were "purely" de novo, the reviewing court could decide the issue independently of the agency's resolution of the issue. While the Kentucky Court agrees that new evidence may be heard and that the subsequent decision-maker should not apply the more limited substantial evidence test, the Court will not al-

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State Bd. of Equalization, 239 U.S. 441 (1915). *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 12:1-:3 (2d ed. 1979).

[19] 280 S.W.2d 517 (Ky. 1955).

[20] The standard of review was borrowed from Louisville & Jefferson County Plan. & Zoning Comm'n v. Grady, 273 S.W.2d 563 (Ky. 1954). *Grady* involved a de novo hearing on an applicaton for a change in a zoning classification; it was apparently the first Kentucky case to inquire directly into the scope of de novo hearings. A considerable portion of the opinion was devoted to a study of how other states had defined the term "de novo."

[21] Civil Service Bd. v. Fehler, 578 S.W.2d 254, 258 (Ky. Ct. App. 1978) (paraphrasing *Noffsinger*).

[22] Kilburn v. Colwell, 396 S.W.2d 803, 804 (Ky. 1965). In *Kilburn* a police officer was discharged for misconduct; on appeal to the circuit court the case was tried de novo and the dismissal was affirmed. Kilburn was granted a trial de novo under KRS § 95.460 (1971), which provided that "any member of the police . . . found guilty by the city legislative body of any charge . . . may appeal to the circuit court" and the case would be tried de novo.

low the total lack of deference to the agency that a pure de novo hearing permits. Instead, the subsequent decision-maker must decide whether the evidence, including new evidence, heard before the circuit court preponderates against the decision made by the administrative body. Thus, in a pure de novo jurisdiction no reference to the prior hearing need be made, while the Kentucky courts will demand a reference back to the decision of the agency to see if the evidence heard by the subsequent decision-maker preponderates against the prior decision-maker's decision.

In reaffirming its confidence in the *Noffsinger* standard, the *Brady* Court held that

> in public employee discharge cases where there is a trial de novo statute, the discharged employee is entitled to something less than a classic trial de novo in circuit court. . . . [T]he burden of proof shifts to the discharged employee. After review of the transcript of evidence or hearing the witnesses, the trial court is limited in its decision. The trial court may not substitute its judgment for that of the administrative body. . . . The trial court may find the discharged employee has failed to meet the burden of proof and affirm the action of the administrative board; or if it is found that the employee has sustained the burden of proof, the trial court may set aside the punishment.[23]

While reaffirming the *Noffsinger* standard, the *Brady* Court "further refined" trials de novo by placing upon the discharged employee the "obligation of producing the transcript of evidence of the proceeding before the administrative board."[24] The Court further held that a "corollary" to the shifting of the burden of proof is a "review of the transcript of evidence in the circuit court," but the de novo hearing is not limited to a reexamination of this transcript.[25] Instead, the discharged employee may call additional witnesses.[26] The review by the trial court, however, is limited to the same issues

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[23] 586 S.W.2d at 32-33.
[24] *Id.*
[25] *Id.*
[26] *Id.*

as were presented to the administrative agency.[27]

B. City of Columbia v. Pendleton

The most recent attack on de novo hearings arose in *City of Columbia v. Pendleton*.[28] The city council had discharged two police officers for violation of departmental rules. On de novo review, the trial court employed the *Noffsinger* standard and found that "the evidence preponderated against the decision of the City Council."[29]

The city argued that section 115 of the Kentucky Constitution abolished de novo hearings,[30] but the court of appeals disagreed and held that section 115's language that "appeals shall be upon the record and not by trial de novo"[31] applied to appeals from "one court to another and not . . . [to] appeals from administrative agencies."[32] While an appeal from a trial court to an appellate court cannot constitutionally be de novo, review of an agency decision in a trial court is not in actuality an "appeal" but is in fact treated as an "original" action.[33] In other words, for purposes of trial court jurisdiction and of the Constitutional amendment dealing with subsequent appellate jurisdiction, the complaint for review of administrative action filed with the trial court is an "original" action and not an "appeal," because there is no prior *court* action.[34] The court of appeals proceeded to hold that the trial court's application of the *Noffsinger* standard of review was consistent with *Brady*.[35]

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[27] *See id.*

[28] 595 S.W.2d 718 (Ky. Ct. App. 1980).

[29] *Id.*

[30] Section 115, adopted in 1975, provides in part: "In all cases, civil and criminal there shall be allowed as a matter of right at least one appeal to another court. . . . Appeals shall be upon the record and not by trial de novo." KY. CONST. § 115 (1975).

[31] *Id.*

[32] 595 S.W.2d at 718.

[33] *Id.*

[34] *See* Sarver v. County of Allen, 582 S.W.2d 40 (Ky. 1979).

[35] 595 S.W.2d at 719-20. The court of appeals said:

> In any hearing of charges against a police officer the hearing body is faced with two determinations. It must be determined first whether the officer has violated the rules and regulations of the department and if so, the hearing body must exercise its discretion in imposing a penalty. The first deter-

C. Civil Service Board, City of Newport v. Fehler

Prior to *Brady*, the Kentucky Court of Appeals in *Civil Service Board, City of Newport v. Fehler*[36] determined the standard of review for a de novo hearing consented to by the parties.[37] The case involved the dismissal of the Superintendent of the Department of Public Works of the City of Newport for alleged inefficiency and incompetence during a snow emergency.[38] Proceeding under a local city ordinance and KRS section 90.360,[39] the Newport Civil Service Board held a hearing at which both the Board and Fehler presented proof. The Board, concluding that Fehler was guilty of the charges, dismissed him. Fehler appealed to the circuit court, which heard the case de novo by the consent of both parties.[40] The

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mination is subject to judicial review, but the second is not.

Id. The city had argued that the trial judge had decided the officers had received "too harsh a punishment." However, since the written findings of the trial judge held merely that "the evidence preponderated against the decision of the city council" and had exonerated the officers on this ground, the trial judge had not stepped outside the confines of his discretion. *Id.*

[36] 578 S.W.2d 254 (Ky. Ct. App. 1978).

[37] The court also examined whether 20 supplemental findings of fact and conclusions of law, filed more than ten days after the entering of a final judgment, fell within the exception of CR 60.01, providing for relief from a judgment or order as to "clerical mistakes" because of "oversight or omission." The court held they did not. 578 S.W.2d at 257.

[38] *Id.* at 256. The dismissal stemmed from an allegation that Fehler had failed to assemble a snow emergency crew in time to deal with the emergency. Fehler denied that he was at fault. Testimony of Fehler and others (including the subsequently hired superintendent of public works) demonstrated that it was the responsibility of the crew foreman to assemble and dispatch the crews and not the responsibility of the superintendent. Additionally, Fehler testified that he had attempted to call out a crew earlier but had been unsuccessful in his attempts, partially due to his unfamiliarity with the system. *Id.* at 256-57.

[39] KRS § 90.360(1) (1980) provides:

> No employe in the classified service of a city of the second or third class shall be dismissed, suspended or reduced in grade or pay for any reason except inefficiency, misconduct, insubordination or violation of law involving moral turpitude, or, in a city of the third class, violation of any rule adopted by the city legislative body or civil service commission.

[40] KRS § 90.370(1) (1980) provides that an employee found guilty under KRS § 90.360 (1980) "may bring an action in the circuit court," and KRS § 90.370(2) (1980) provides that this action shall be "tried as an original action." It is unclear whether this language is enough to constitute a statutory right to de novo review. *Cf.* Chandler v. Roudebush, 425 U.S. 860 (1976). Since both parties consented to the de novo review, the question was not presented to the court. The statute involved in Osborne v.

circuit court determined that the Board's findings were not substantially supported by the evidence and ordered Fehler's reinstatement.[41] The Board appealed, arguing that certain affidavits supporting Fehler, but not admitted at the hearing, were inadmissible in the circuit court.[42] The Board argued that under KRS section 90.370(2)[43] evidence other than presented at the hearing could not be presented to the circuit court on review.[44] The court of appeals, however, affirmed the circuit court's decision.[45]

The Board's argument to the appeals court was noteworthy considering that the Board had consented to the de novo review.[46] An argument that a statute's language precludes from the trial court's consideration evidence other than that evidence presented at the agency hearing reflects opposition to de novo review. If the Board felt compelled to raise this argument, it is unclear why it would initially consent to de novo review. Also if the statutory language of KRS section 90.370(2) does not permit de novo review,[47] the *Fehler* decision is significant in that the court has allowed a de novo hearing on the basis of the parties' consent and not on the basis of statutory intent. To the extent that the deference to agency decision-making represented by the substantial evidence standard is meant to further the interests of the administrative and judicial system (by efficiently allocating decision making powers), rather than the interests of particular parties, it could be argued that de novo review should not be granted in the absence of statutory authorization, even when the consent of the parties is given. The Kentucky Court of

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Bullitt County Bd. of Educ., 415 S.W.2d at 607, did not provide expressly for a "de novo" review. The Court did find the right to de novo review present where the statute read: "The teacher shall have a right to make an appeal both as to law and as to fact to the circuit court." 415 S.W.2d at 612 (quoting from KRS § 161.790(6) (1980)). See Carter v. Craig, 574 S.W.2d 352 (Ky. Ct. App. 1978) and note 2 *supra* for a discussion of this latter statute.

[41] 578 S.W.2d at 256.

[42] *Id.*

[43] See note 40 *supra* for a description of KRS 90.370(2) (1980).

[44] 578 S.W.2d at 258.

[45] *Id.*

[46] *Id.* at 256.

[47] See note 40 *supra* for a discussion concerning the statute's intent.

Appeals may have implicitly rejected this argument.

The *Fehler* court held that the *City of Owensboro v. Noffsinger* standard allowed the trial court to hear "additional evidence," saying "the standard does not confine [it] to the transcript of [the] hearing."[48] Furthermore, the court added, it was not necessary that the findings of fact and conclusions of law entered by the trial court be expressed in terms of "preponderance."[49] Instead, the trial court's contrary finding that there was no evidence that Fehler was incompetent or inefficient necessarily implied that the evidence preponderated against the Board's determination.[50] This holding is consistent with the idea that in trying a case de novo, a trial court may proceed on judicial review as it would in an original action. The circuit court, acting as a fact-finding body, hearing witnesses anew, and considering all the evidence heard in the circuit court, decides whether the evidence preponderates against the administrative body's decision, rather than deciding on the basis of substantial evidence.

In summary, de novo review of agency action is permitted under the Kentucky Constitution in some but not all circumstances, where provided by statutes or perhaps by the consent of the parties. But unlike "pure" de novo review, where the reviewing court may decide the issue without deference to the agency's decision, in Kentucky the reviewing court determines only whether, after hearing all the evidence, including new factual submissions, the evidence preponderates against the decision made by the agency. The limited deference to agency decision-making represented by this shifting of the burden of proof to the challenger of agency action may in fact have served to alleviate some of the Supreme Court's concern about the constitutionality of statutorily mandated de novo review.

II. THE DELEGATION DOCTRINE

There has long been a dispute over whether the legisla-

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[48] 578 S.W.2d at 258.

[49] *Id.* at 259. The trial court's order of reinstatement was hence affirmed and Fehler was awarded $12,801 for wrongful dismissal.

[50] *Id.*

ture, operating within a "separation of powers" framework, may "delegate" certain legislative powers. The separation of powers doctrine found in the federal and state constitutions, coupled with the common law agency principle that a power originally delegated cannot be redelegated, was used to devise a "nondelegation doctrine."[51] This doctrine was "theoretically based on the notion that, since our three traditional branches of government exercise legislative, executive, and judicial powers constitutionally delegated by the people, those institutions, in order to insure that they remain the sole repositories of such power, should not be permitted to further delegate their authority."[52] With the development of a modern industrial society, however, it became necessary to tolerate a certain degree of delegation in order to allow the law to respond to the changing circumstances of a developing nation.[53] Kentucky, in an effort to respond to this change, adopted an "adequate standards" test. The legislature could constitutionally delegate certain legislative functions to an administrative body if the legislature "set out an intelligible policy"[54] for the administrative body to utilize as a guide in its exercise of power. In 1961, Kentucky abandoned the "adequate standards" test in favor of a "safeguards" test.[55] As long as there were "safeguards" against abuse, the delegation would be constitutional. Two recent Kentucky Court of Appeals cases, although subsequently reversed by the Supreme Court, reflected uncertainty in the application of the safeguards test, without regard to "adequate standards."

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[51] Ziegler, *Legitimizing the Administrative State: The Judicial Development of the Nondelegation Doctrine in Kentucky*, 4 N. KY. L. REV. 87 (1977).

[52] *Id.* The sections of the Kentucky Constitution utilized to attack the delegation of legislative power are §§ 27-29 (separation of powers), § 60 ("no law . . . shall be enacted to take effect upon the approval of any other authority than the General Assembly") and § 2 (precludes the state from taking "absolute and arbitrary power over the lives, liberty and property of freemen"). *Id.* at 92.

[53] Commonwealth v. Associated Indus. of Ky., 370 S.W.2d 584 (Ky. 1963). *See* Ziegler, *supra* note 51, at 100.

[54] Youngs v. Willis, 203 S.W.2d 5 (Ky. 1947).

[55] Butler v. United Cerebral Palsy of North. Ky., Inc., 352 S.W.2d 203 (Ky. 1961).

A. *The Federal View*

The "adequate standards" requirement initially appeared in the early 1930's.[56] The courts reasoned that a necessary degree of tolerance could be accomplished if the legislative body would state "an intelligible principle," with the administrative authority merely "fill[ing] in the details."[57] In other words, the legislature would remain the principal lawmaking body, while the administrative agency's rulemaking would be secondary and subordinate.[58]

To understand the requirement fully, it is important to examine federal law. The United States Supreme Court has purported to apply an adequate standards test.[59] In an early statement of the adequate standards test, the Court said:

> The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to

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[56] United States v. Chicago, M., St. P. & P. R.R., 282 U.S. 311 (1931). "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard . . . ." *Id.* at 324.

[57] Butler v. United Cerebral Palsy of North. Ky., Inc., 352 S.W.2d at 207-08 (Ky. 1961). *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.01-.16 (1958).

[58] Ziegler, *supra* note 51, at 100.

[59] "[C]ongress may delegate the exercise of its regulatory power, under proper standards . . . ." Ramspeck v. Federal Trial Examiners Conf. 345 U.S. 128, 133 (1953). "[I]t then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946).

> The mandate of the Constitution [article 1, § 1] that all legislative powers granted "shall be vested" in Congress has never been thought to preclude Congress from resorting to the aid of administrative officers or boards as fact-finding agencies whose findings, made in conformity to previously adopted legislative standards or definitions of congressional policy, have been made prerequisite to the operation of its statutory command.

Opp Cotton Mills v. Administrator, Dept. of Labor, 312 U.S. 126, 144 (1941).

> We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly. We pointed out in the *Panama Company* case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality which will enable it to perform its functions in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits . . . .

Schechter Poultry Corp. v. United States, 295 U.S. 495, 529-30 (1935).

> selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.[60]

The Supreme Court has only twice held a delegation of power to an administrative body unconstitutional,[61] and both of those decisions occurred during the time of judicial resistance to the New Deal and are now over forty-five years old. The Court's restraint in striking down delegations for this lengthy period of time may mean there is no longer a real possibility of a statute's being rejected on the theory that it is an unconstitutional delegation of power. Recently, however, an indication has come from at least one member of the Supreme Court that rejection of a statute on that ground is still a possibility. Justice Rehnquist, concurring in *Industrial Union Department v. American Petroleum Institute*,[62] noted that the Court should "once more take up its burden of ensuring that Congress does not unnecessarily delegate important choices of social policy to politically unresponsive administrators."[63] Observing that legislative delegations of authority to administrative agencies are generally supported by a need for expertise,[64]

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[60] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). This case involved an oil producer's attack on regulations instituted by the Secretary of the Interior and designed to enforce an executive order of the President, under the National Industrial Recovery Act, which would have prohibited the transportation of excess petroleum in interstate and foreign commerce. In *Panama*, the Court held that the regulations were an unconstitutional delegation of legislative power.

[61] *Id.*; Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Cases upholding delegations include: United States v. Southwestern Cable Co., 392 U.S. 157 (1968); American Trucking Ass'ns, Inc. v. Atchinson, T. & S.F. R. Co., 387 U.S. 397 (1967) (upheld broad delegations of power); United States v. Chicago M., St. P. & P. R.R., 282 U.S. 311 (1931); Hampton & Co. v. United States, 276 U.S. 394 (1928) (did not discuss the need for an "adequate standard" but did indicate that a delegation of power would not be forbidden if Congress laid down an "intelligible principle").

[62] 448 U.S. 607, 671 (1980) (Rehnquist, J. concurring). This case involved a challenge by the American Petroleum Institute of certain OSHA regulations defining the standards by which toxic material was to be handled in the work place. The Court invalidated the regulations. Four of the five vote majority reasoned that the regulation did not meet the requirements of the OSHA Act as interpreted by the Court. Justice Rehnquist concurred on the ground that the Act inadequately set standards for the agency to use in promulgating regulations.

[63] *Id.* at 686.

[64] The many later decisions that have upheld Congressional delegations of authority to the Executive Branch have done so largely on the theory that

Justice Rehnquist thought the legislation involved "fail[ed] to pass muster"[65] on this basis and, furthermore, expressed a desire to return to the reasoning of the two early Supreme Court cases striking certain legislative delegations as unconstitutional.[66] While there are circumstances in which adequate standards can be derived in order to save a legislative delegation, Rehnquist did not believe any particular conditions supplied standards adequate to save the delegation involved.[67] The four vote plurality in *Industrial Union* (with whom Rehnquist concurred in judgment) apparently reaffirmed their belief in the early case law striking particular statutes as unconstitutional delegations,[68] although, unlike Rehnquist, they did not believe the nondelegation doctrine was applicable in the instant case. This reaffirmation, coupled with the fact that Justice Rehnquist was the swing vote in the four-one-four decision, may indicate that the federal nondelegation doctrine is not completely dead.

> Congress may wish to exercise its authority in a particular field, but because the field is sufficiently large, and the members of Congress themselves not necessarily expert in the area in which they choose to legislate, the most that may be asked under the separation-of-powers doctrine is that Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards, "fill in the blanks," or apply the standards to particular cases.

Id. at 675.

[65] *Id.*

[66] *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[67] Justice Rehnquist indicated that, other than the need for expertise, there were five conditions from which standards could be drawn to sustain a delegation of legislative authority. 448 U.S. at 671 (Rehnquist, J., concurring). The courts could determine if there were standards expressed within the statute's legislative history that might save the delegation. Another suggestion was that the courts look at the "purpose" of the act and the "context" in which it was passed. *See* American Power & Light Co. v. SEC, 239 U.S. 90 (1946). The courts might also look at "pre-existing administrative practice," *i.e.*, how the agency has acted in the past and how Congress has reacted to this action. *See* Lichter v. United States, 334 U.S. 742 (1948). The courts might also look to whether the delegated area is one in which a delegate has "residual authority," such as in the area of foreign affairs. *See* United States v. Curtis-Wright Export Corp., 299 U.S. 304 (1936). Finally, the courts might look to see whether it is feasible for Congress to draw the necessary guidelines. *See* 329 U.S. at 90.

[68] The Court pointed out that *Schechter Poultry* and *Panama Refining* may apply where the statute constitutes a "sweeping delegation." 448 U.S. at 646.

Recent lower federal court decisions have only expressed by way of dictum that it is possible to fail the adequate standards test.[69] A 1964 federal district court case exemplifies the conception of the test in the federal courts. *Brotherhood of Local Fire & Engineers v. Chicago, Burlington & Quincy R.R.*[70] involved an action to impeach and to set aside an award of a special arbitration board created by Congress to impede an imminent rail strike. Standards such as " '[a]dequate and safe transportation service to the public'; 'interests of the carrier and employees affected';" and " 'due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation',"[71] were upheld as adequate.[72] While standards are required by the federal courts, the court said, "[t]he law, however, does not require that the standards and guides be defined with the accuracy and precision of a mathematical formula. . . . It is sufficient if Congress indicates a general criterion or an aim to serve as a guide to the administrative agency."[73]

B. *The Davis View*

While the federal courts have continued their support of the adequate standards test, Kentucky has abandoned it in favor of the "safeguards" test. The reasoning supporting this test is that standards are not necessary where certain procedural safeguards exist. The major proponent of the safeguards test, Professor Kenneth Davis, suggests a number of safe-

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[69] *See* Plum Creek Lumber Co. v. Hutton, 608 F.2d 1283 (9th Cir. 1979). The argument in *Plum Creek* that the statute was an unconstitutional delegation due to inadequate standards was rejected by the court on the ground that it had not been argued in the district court and was thus untimely. Notwithstanding this, the court said the argument was not persuasive. A standard is required, but "it is evident the standards need not be precise." 608 F.2d at 1288. *See* Amalgamated Meat Cutters 337 F. Supp. 737 (D.D.C. 1971); *see also* Upholstered Furniture v. California Bur. of Home Furnish., 442 F. Supp. 565 (E.D. Cal. 1977); Rite Aid Corp. v. Board of Pharmacy, 421 F. Supp. 1161 (D.N.J. 1976). In all of these cases the delegations were upheld; in the last two cases the courts considered state statutes delegating legislative authority.

[70] 225 F. Supp. 11 (D.D.C. 1964).

[71] *Id.* at 23. *See* 45 U.S.C.A. § 157 (1963).

[72] 225 F. Supp. at 23.

[73] *Id.* at 22.

guards which typically exist in "frameworks of procedural safeguards, plus executive, legislative or judicial checks."[74] The salient issue is:

> not what the statute says but what the administrators do. The safeguards that count are the ones the administrators use, not the ones mentioned in the statute. The standards that matter are the ones that guide the administrative determination, not merely the ones stated by the legislative body. The test should accordingly be *administrative* safeguards and standards, not *statutory* safeguards and standards.[75]

In other words, the safeguards test could be met even if it is the administrative body itself that is responsible for establishing the necessary procedural safeguards. Davis believes delegation without standards is necessary if a modern administrative agency is to complete its task effectively in today's complex scheme of government.[76] Only by permitting the agency to develop its own safeguards will flexibility be achieved.

Davis, however, does not completely reject the proposition that legislatures should design statutory standards. Indeed, he states that:

> legislative bodies should clarify their purposes to the extent that they are able and willing to do so, but when they choose to delegate without standards, the courts should uphold the delegation whenever the needed standards to guide particular determinations have been supplied through administrative rules or policy statements.[77]

If the legislative body fails to adopt a standard, a court would not hold the delegation unconstitutional but would require the agency to provide the required safeguards as "rapidly as feasible."[78] The purpose behind nondelegation should not be to require statutory standards but should be to protect against "unnecessary and uncontrolled discretionary power."[79]

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[74] 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3:15, at 210 (2d ed. 1978).
[75] *Id.* at 211.
[76] *Id.* at 208.
[77] *Id.* at 212.
[78] *Id.* at 207.
[79] *Id.* at 206.

Davis contends that administrative standards will be just as effective as statutory standards in curbing agency abuse of discretion.

C. *Adequate Standards vs. Safeguards in Kentucky*

Kentucky made the transition to the safeguards test in *Butler v. United Cerebral Palsy of Northern Kentucky, Inc.*[80] The *Butler* case involved an attack on the validity of a statute authorizing "public aid to private institutions for the education of 'exceptional children.' "[81] The Superintendent of Public Instruction for Kentucky challenged the statute, arguing that the authorization of public aid to provide schools for the education of "exceptional children" left the required eligibility determination to the "untrammelled discretion" of the superintendent or the state board.[82] In other words, the superintendent was arguing that the term "exceptional children," by which the authorization of public funds was to be made, was an inadequate standard. Indicating that the need for standards was "mumbo-jumbo,"[83] the Court upheld the statute, saying "the need is usually not for standards but for safeguards."[84] The Court's reasoning was basically that advanced by Davis: that safeguards are desirable in order to insure the agency has limits to its discretionary power.[85] Further, the Court accepted the "agency flexibility" argument presented by Davis, stating:

> The difficulty is that it is often affirmatively desirable for the legislative body to avoid either intelligible principle or a clear delineation of the general policy, for the simple reason that many questions of basic policy may better be worked out by an agency than by a legislative body.[86]

Finally, the Court suggested, as Davis had supposed,[87]

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[80] 352 S.W.2d 203 (Ky. 1961).
[81] *Id.* at 204.
[82] *Id.* at 205.
[83] *Id.* at 207 (citing 1 K DAVIS, ADMINISTRATIVE LAW TREATISE § 22.11 (1958)).
[84] 352 S.W.2d at 207.
[85] *See id.*
[86] *Id.* at 208.
[87] Legislatures, especially in closing hours of a session, are often less respon-

that the practical requirements of Kentucky's state government required the use of the safeguards test. The Court said:

> The members of the legislature are allowed to meet in regular session only 60 days every two years. They have neither the time, facilities, nor qualifications to do more than indicate the class and fix the amount to be spent. At the state's disposal, however, is its board of education, an agency fully and better qualified than the legislature to establish and carry out whatever further policies and procedures may be necessary or desirable. This body also is one of the most responsible and long-established agencies of the state government.[88]

Moreover, the Court believed discriminatory or arbitrary behavior on behalf of a state administrative body would be practically impossible due to the inherent right of judicial review of discriminatory behavior.[89] Although the Court did not expressly indicate which particular safeguards it relied upon to uphold the act, the inherent right provided by the state constitution to judicial review of discriminatory action[90] and the court's faith in the school board as a responsible agency[91] seem to have been most important to the Court.

Subsequent Kentucky cases have reaffirmed the use of the safeguards test. *Commonwealth v. Associated Industries of Kentucky*[92] involved a delegation of power to the State

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> sible than Congress; their draftsmen are often less skillful in clarifying legislative intent; direct responsiveness to special-interest groups is often more pronounced; committee investigations are usually less thorough; delegations to petty officers is more common; and especially, safeguards to protect against arbitrary action are generally less developed.

1 K. DAVIS, *supra* note 74, § 2.06.

[88] 352 S.W.2d at 208.

[89] *Id.*

[90] *Id.* Ziegler says that this inherent right is provided by § 2 of the Kentucky Constitution. Ziegler, *supra* note 51, at 109. Section 2 of the Kentucky Constitution reads: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." KY. CONST. § 2.

[91] 352 S.W.2d at 208.

[92] 370 S.W.2d 584 (Ky. 1963). *See also* Holsclaw v. Stephens, 507 S.W.2d 462 (Ky. 1973); Kentucky State Bd. of Business Schools v. Electronic Computer Programming Inst., Inc., 453 S.W.2d 534 (Ky. 1970); Commonwealth Dept. of Child Welfare v. Lorenz, 407 S.W.2d 699 (Ky. 1966) (all upholding statutory delegations on the basis of the safeguards test).

Commissioner of Economic Security, allowing the Commissioner to enter into reciprocal agreements with the federal and other state governments, which would permit those sovereigns to fix by their laws the eligibility criteria, amount, and duration of unemployment benefits for Kentucky citizens under an interstate unemployment compensation plan.[93] Overruling earlier case law[94] precluding this form of delegation to other sovereigns, the Court held that the Kentucky Constitution did not prohibit this delegation of legislative power to other states[95] and found "the laws of other states or of the federal government to be a sufficient and effective safeguard."[96] Additionally, the Court viewed the legislature's power to revoke the delegation an an important safeguard.[97]

It is possible, however, to fail the safeguards test in Kentucky. In *Miller v. Covington Development Authority*,[98] the Court relied on the safeguards test to invalidate a statute delegating power to determine historical and economically significant areas for preservation to independent development authorities in first and second class cities.[99] The Court found that the authorities' power was not restricted by statutory standards or safeguards, and said that leaving the authorities to determine which areas were historically or economically significant was not a sufficient safeguard to prevent abuse of discretion.[100] The safeguards of a "long established administrative agency . . . with a track record of experience and expertise in a well recognized field"[101] did not exist under the statute involved. Moreover, the powers delegated were not so

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[93] *See* KRS § 341.145 (1972).

[94] Dawson v. Hamilton, 314 S.W.2d 532 (Ky. 1958).

[95] 370 S.W.2d at 586.

[96] *Id.* at 589.

[97] *Id.* at 588.

[98] 539 S.W.2d 1 (Ky. 1976).

[99] KRS §§ 99.610-.680 (Cum. Supp. 1980) was the statute involved. The authority consisted of a mayor and seven commissioners, given prominent discretionary power in the area of "preservation and revitalization of historically or economically significant local areas." *Id.* KRS § 99.610 (Cum. Supp. 1980). Such authorities were authorized to acquire property, make loans, make grants, construct housing, and issue bonds. 539 S.W.2d at 2-3.

[100] 539 S.W.2d at 4.

[101] *Id.*

complex that it would be unrealistic not to vest them in an administrative agency.[102] A city or county government could itself determine the preservation area. Also, the term "economically significant area" was inadequately defined by the legislature.[103] For these reasons, the Court found the statute an impermissible delegation.

While these earlier cases seem to adopt the safeguards test, two recent cases involving the extent to which the Kentucky Human Rights Commission is empowered to award monetary damages for embarrassment and humiliation suffered as a result of unlawful discrimination[104] showed an uncertainty by the Kentucky Court of Appeals over which delegation test to apply.

In *Kentucky Commission on Human Rights v. Barbour*,[105] the Commission made the finding, following a full public hearing,[106] that an employer had unlawfully discriminated against one of the complainants on the basis of race and awarded $750.000 in damages for the appellant's embarrassment and humiliation.[107] The Commission "did not explain why that particular sum was appropriate."[108] Stating that the Commission's action was a "usurpation of judicial authority,"[109] the Franklin Circuit Court, on review, refused to award the damages in the belief that the statute was an unconstitutionally vague and overbroad delegation of legislative power.

The act in question provides:

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[102] *Id.*

[103] *Id.* The Court also indicated that legislative delegations of city or county powers may be less necessary than delegations of state legislative powers. Id. at 4-5.

[104] KRS § 344.230 (1972), permits the Commission to pursue a number of forms of affirmative action if the Commission discovers, based on its findings of fact and conclusions of law, that the relief granted was warranted. It should be noted also that KRS § 344.230(3) (1972) states that "affirmative action ordered under this section may include *but is not limited to*" the forms of action detailed by the statute. *Id.* (emphasis added).

[105] 587 S.W.2d 849 (Ky. Ct. App. 1979), *rev'd*, No. 81-SC-35-T (Ky. 1981).

[106] The hearing was held "according to the procedures set out in KRS Chapter 344 and 104 Kentucky Administrative Regulations § 1:020." 587 S.W.2d at 850.

[107] *Id.*

[108] *Id.*

[109] *Id.*

> Payment to the complainant of damages for injury caused by an unlawful practice including compensation for humiliation and embarrassment, and expense incurred by the complainant in obtaining alternative housing accommodations and for other costs actually incurred by the complainant as a direct result of such unlawful practice.[110]

The circuit court criticized the fact that the act contained "no standards or guidelines for the exercise of the discretion"[111] bestowed by the statute upon the Commission and reversed the Commission's award. Noting that the statute imposed no "monetary ceiling"[112] upon the amount of damages that can be awarded for embarrassment and humiliation, the court believed "that neither the provision that the award must be based upon the commission's findings, nor the statutory provision for review in circuit court . . . cures the legislative failure to limit recovery for embarrassment and humiliation."[113]

On appeal the Kentucky Court of Appeals noted that in *Butler v. United Cerebral Palsy of Northern Kentucky, Inc.*,[114] "the necessity for standards or guidelines accompanying legislative delegations was expressly rejected."[115] *Butler*, the *Barbour* case pointed out, "placed Kentucky in the forefront of states"[116] relying on the safeguards test.

Rejecting the notion that the legislature was required to "state an 'intelligible principle' and that the administrative authority would merely 'fill in the details,' "[117] the *Barbour* opinion proceeded to list five criteria by which a delegation

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[110] KRS § 344.230(3)(h) (1972).

[111] 587 S.W.2d at 850.

[112] *Id.*

[113] *Id.*

[114] 352 S.W.2d 203 (Ky. 1961).

[115] 587 S.W.2d at 849.

[116] *Id.* at 851. Davis emphasizes that "[a] good many state courts have been following that lead in emphasizing safeguards instead of standards." K. DAVIS, *supra* note 74, at § 2.03. *See generally* Kugler v. Yocum, 445 P.2d 303 (Cal. 1968); Elk Run Tel. Co. v. General Tel. Co., 160 N.W.2d 311 (Iowa 1968); Department of Health v. Owens-Corning Fiberglas Corp., 242 A.2d 21 (N.J. Super. Ct. App. Div. 1968); Schmidt v. Department of Resource Dev., 158 N.W.2d 306 (Wis. 1968).

[117] 352 S.W.2d at 207. "The notion that the courts must compel the legislative body to state an intelligible principle to guide all exercise of delegated power wrongly assumes that the only wisdom to be found in the various organs of government is entirely concentrated in the legislative body." DAVIS, *supra* note 74, at § 2.03.

should be judged when applying the safeguards test:

> (1) whether provisions exist in the delegating statute sufficient to determine that the powers delegated are confined to a specific area of authority or are at least within an ascertainable scope of authority;
> (2) whether the delegation is to a newly created agency or to a long established agency with a record of experience and expertise in the field;
> (3) whether significant decisions will be left to the untrammelled discretion of the agency or if the agency is required to establish criteria for its decisions by issuing regulations;
> (4) whether agency decisions affecting the rights of individuals are inherently reviewable by the courts in Kentucky;
> (5) whether the delegation is necessary in light of the practical needs of effective government.[118]

After reviewing these five criteria and agreeing they were "helpful," the court concluded that the criteria did not totally answer the question, particularly where some of the criteria were met by the statute and others were not.[119] While the statute would satisfy points one and four, it would not satisfy points two and three.[120] Moreover, the outcome under the fifth factor was, the court stressed, "a highly subjective matter."[121]

After commenting that it did not wish to "invalidate a constitutionally marginal statute if such a course can be avoided,"[122] the court decided that it was unable to cure the "statute's probable deficiency" by creating a dollar limit.[123]

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[118] 587 S.W.2d at 851. The court took the criteria from Ziegler, *supra* note 51, at 118.

[119] 587 S.W.2d at 851.

[120] *Id.* at 852.

[121] *Id.* Concerning the fifth factor the court stated:

> [N]either our research nor that of the parties has disclosed another statute in any jurisdiction within the United States which authorizes damages for embarrassment and humiliation without placing a dollar limit on those damages. Any argument that a provision allowing such damages without statutory limitation is "necessary in light of the practical needs of effective government," has obviously not taken the legislatures of our nation by storm.

Id. at 852.

[122] *Id.*

[123] *Id.*

The court, however, avoided the problem by determining that it was not necessary to decide the constitutionality of the statute,[124] and reversed and remanded the case on an alternative ground. Requiring "strictest compliance with the provision that affirmative action must be in accordance with the Commission's findings of fact" and therefore requiring "detailed written findings" to support damages for embarrassment and humiliation, the court remanded the case to the Commission to "set out with particularity the nature and degree of the injury suffered."[125] As discussed at the end of this survey, the Supreme Court of Kentucky reversed the holding of the court of appeals in *Barbour*.[126]

Another recent opinion of the Kentucky Court of Appeals, *Kentucky Commission on Human Rights v. Fraser*,[127] also complicates Kentucky nondelegation law. The *Fraser* case seems to be a limited backward step toward an application of the adequate standards test. *Fraser* involved an award under KRS section 344.230(3)(h) of damages for job-related sex discrimination based on alleged humiliation and embarrassment.[128] The court of appeals adopted the lower court's opinion in its entirety[129] and, despite an apparent expression of confidence in the basic principles espoused in *Barbour*,[130]

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[124] *Id.*

[125] *Id.* Certain suitable factors to discuss, the court said, were:

1) the number of persons exposed to the defendant's conduct;
2) the number of encounters during which the claimant was exposed to behavior inducing embarrassment or humiliation;
3) whether the actions of the defendant caused humiliating public exposure;
4) any evidence of severe emotional damage; and
5) the presence or absence of aggravating factors such as abusive language.

[126] See text accompanying notes 148-55 *infra*.

[127] 27 KY. L. SUMM. 11, p. 4 (Ky. Ct. App. 1980) [hereinafter cited as KLS], *rev'd*, No. 80-SC-633-DG (Ky. 1981).

[128] The employee claimed that she was fired because she was pregnant. *Id.*

[129] *Id.* at pp. 4-7.

[130] The court of appeals said that *Barbour* dealt "honestly and fairly with certain grave and complex circumstances" but that

> [t]he trouble with most litigation, and certainly the more complex cases, is not so much the basic right of each case in which general and fundamental principles are laid down; rather it is the slight factual changes in each case with the attempt slowly but surely to keep adding the subtle expressions of principles of law until it finally embraces concepts and doctrines never initially intended.

determined that the statute was unconstitutional for lack of standards. Although the circuit court, in the opinion adopted by the court of appeals, did not believe the employee had sufficiently shown adequate humiliation and embarrassment to justify the award,[131] it held that even assuming she clearly was embarrassed and humiliated, the Commission did not have a proper standard upon which to base an award.[132] "[A]n award for humiliation and embarrassment is simply beyond review as to reasonableness by any measurable standard,"[133] said the court.

Even though the court acknowledged the fundamental principles of *Barbour*, the language of the opinion indicated reliance on a standards test rather than on a safeguard test. Holding that an award for humiliation and embarrassment is constitutionally beyond the powers of the Commission[134] was remarkable in light of Kentucky's long-standing confidence in the safeguards test[135] and the *Barbour* opinion's reaffirmation of that confidence.

Although the *Fraser* and *Barbour* holdings were recently reversed,[136] they do indicate difficulty with the application of

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Id. at p. 4.

[131] The court said: "There is simply no proof of humiliation or embarrassment on the part of Mrs. Cooper. Neither Mrs. Cooper nor any witness testified to her being humiliated . . . or embarrassed . . . or to any facts that would warrant that conclusion." *Id.* at p. 6.

[132] *Id.*

[133] *Id.*

[134] *Id.* The adopted opinion stated that this suit, which was by its nature a personal tort and not a business-oriented injury, belonged in a court of law and not a "politically appointed administrative body." *Id.*

[135] Kentucky presumably has followed the safeguards test since the decision in Butler v. United Cerebral Palsy of North Ky., 352 S.W.2d 203 (Ky. 1961).

[136] As noted, the opinion adopted by the court of appeals consisted almost wholly of the lower court's opinion. While the lower court's "reasoning and conclusions" were incorporated "in their entirety," the court of appeals also felt constrained to say that it did "not agree with all the philosophies, analogies, and illustrations of the lower court." 27 KLS 11, at p. 4. In particular, the lower court confused its scope of review (substantial evidence), with the standard of proof before the agency (preponderance of the evidence). The lower court seemed to say that *it* must find the evidence to preponderate in order to uphold the agency decision. If that were its meaning, the circuit court was wrongly applying de novo review when the statute clearly requires the more deferential "substantial evidence" scope of review. See text at note 1, *supra*. *Cf.* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). In reversing

the safeguards test by the lower courts. The difficulty lies primarily in Davis' belief that the nondelegation rule and the adequate standards test are important only as stopgaps against an agency's possible abuse of its power.[137] Standards, however, are at least theoretically required by the separation of powers doctrine. Legislative bodies should be responsive to the demands of the people electing them, but Davis would allow the legislature to leave to the administrative body the determination of what standards to apply.[138] Unelected agencies, however, might not apply the standards or make the policy decisions desired by the electorate. Requiring statutes to be promulgated with adequate standards limits the legislature from granting an agency governmental tasks ordinarily subject to the political process.

Professor Davis also contends that leaving the determination of standards to the agency will promote efficiency because of the agency's increased flexibility.[139] If in fact efficiency is increased,[140] this efficiency is gained at the expense of the policies underlying the separation of powers doctrine. In fact, the standards requirement may promote more effective legislation because of the legislature's need to "be more specific in stating how it wants the administrative agency to execute the statute."[141] Administrators then could use these statutory standards to "determine whether the contemplated action corresponds with that which is expected of them."[142]

Davis also argues that judicial review is one safeguard against potential agency abuse; but if a standard is not available, how can a court determine whether an agency-inspired

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Fraser, the Supreme Court of Kentucky stated that interpretation of the standard of review by the lower courts was "clearly wrong," and reaffirmed the substantial evidence test. *Fraser*, No. 80-SC-633-DG, slip op. at 7-8 (Ky. 1981).

[137] *See* 1 K. DAVIS, *supra* note 74, at § 3.15.

[138] *Id.* at 211-14.

[139] *See id.* at 208.

[140] There may be a question as to whether a requirement of adequate standards really impedes efficiency. Considering the hesitancy of the federal courts to overrule broad delegations, and their desire to uphold broad standards, the standards requirement would not appear to impede efficiency by decreasing agency flexibility.

[141] Comment, *State Statutes Delegating Legislative Power Need Not Prescribe Standards*, 14 STAN L. REV. 372 (1962).

[142] *Id.*

rule exceeds the intended delegated power?[143] Statutes with adequate standards allow for an easier determination of agency abuse. Contrary to Davis' assumption,[144] agencies may not always act both reasonably and in the public interest. If the legislature establishes standards, even if the standards are broad, abuse would be easier to detect and simpler to deal with.

Even Kentucky's adoption of the safeguards test is not wholly what Davis proposes. In Davis' view, if an agency is reversed on judicial review because it acted outside the intent of the legislature in applying a standardless statute, the agency is simply allowed to formulate standards in the future.[145] The statute is thus cured of its unconstitutional problems and is saved from invalidation. Kentucky, however, in *Miller v. Covington Development Authority*,[146] invalidated a statute under the safeguards test without saving the statute by permitting the agency to formulate adequate standards of its own. The Court reasoned that the safeguards provided by a delegation to a "long established administrative agency . . . with a track record of experience and expertise in a well recognized field,"[147] did not exist under the statute involved. Perhaps the Court is not willing to extend to every agency the power to formulate its own standards for standardless delegations. While the Kentucky courts may believe the adequate standards test is "mumbo-jumbo," the *Miller* case indicates that they are not yet willing to adopt the Davis safeguard theory entirely.

As noted above, the Kentucky Supreme Court has very recently reversed the court of appeals decisions in *Barbour* and *Fraser*.[148] Reaffirming *Butler*, the Court stated that the

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[143] Ziegler contends that forcing the statute to be "intelligible" will safeguard against abuse. Ziegler, *supra* note 51, at 117. Yet requiring a statute to be "intelligible" is requiring the statute to contain some standard that makes it "intelligible."

[144] *See* 1 K. DAVIS, *supra* note 74, at § 3.15.

[145] *Id.*

[146] 539 S.W.2d 1 (Ky. 1976).

[147] *Id.*

[148] Kentucky Commission on Human Rights v. Barbour, No. 81-SC-35-T (Ky. Dec. 15, 1981); Kentucky Commission on Human Rights v. Fraser, No. 80-SC-633-DG (Ky. Dec. 15, 1981).

general test for delegation of powers to an administrative agency is that of "safeguards, procedural and otherwise, which prevent an abuse of discretion by the agency."[149] The Court found the requisite safeguards in

> (1) . . . the presence of agency regulations, 104 KAR 1:010 *et seq.*, (2) the provision for a full due-process hearing, KRS 344.200 *et seq.* and 104 KAR 1:020, (3) the agency's experience in making similar determinations, and (4) the provision for judicial review, KRS 344.240.[150]

The Court accordingly found that the Civil Rights Act provision was constitutional,[151] and that evidence supported the assessment of damages in each case.[152]

The Court also decided that the statute was not an unconstitutional usurpation fo the judicial power despite the fact that the Commission is involved in adjudication. In contrast to the argument made in *American Beauty Homes*[153] that a statute providing for *de novo* review violates the separation of powers doctrine by imposing administrative duties on courts, the argument here was the reverse: that a statute providing for agency adjudication, with only substantial evidence review, violated the separation of powers doctrine by imposing judicial duties on administrative agencies. The Court rejected this contention, noting that agencies are frequently involved in the adjudication of disputes. The Court relied on the availability of a due process hearing, the availability of judicial review, and the fact that "the statute ade-

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[149] Kentucky Commission on Human Rights v. Fraser, No. 80-SC-633-DG, slip op. at 5.

[150] *Id.*

[151] In reaching this conclusion, the Court also decided that the absence of a jury trial in Human Rights Commission cases does not violate the right to jury trial in civil cases contained in section 7 of the Kentucky Constitution. The Court reasoned that the right involved is a creature of statute, the statute prescribes a proceeding for the adjudication of that right in an administrative forum without a jury trial, and "where a right is created by statute and committed to an administrative forum, jury trial is not required." *Id.* at 3-4. Justice Sternberg dissented on this point.

[152] Justices Stephenson and Sternberg dissented on the issue of the adequacy of the evidence for the assessment of damages.

[153] See text accompanying notes 8-17 *supra* for a discussion of *American Beauty Homes.*

quately defines the prohibited conduct."[154] The Court repeatedly emphasized the last factor.[155] Thus, while not examining the adequacy of standards under the nondelegation doctrine itself, the Court did rely on the presence of such standards in upholding the statute against a direct separation of powers argument.

In summary, the safeguards test, following some uncertainty, has been reaffirmed as the proper test in applying the nondelegation doctrine in Kentucky. The degree to which the Kentucky courts have adopted the views of Professor Davis in their entirety is not as clear. There are difficulties in applying a doctrine based on the separation of powers to achieve the related but distinct goal of avoiding agency arbitrariness, difficulties reflected in the reluctance of the lower courts to dispose of the adequate safeguards standard requirement altogether. At least where agency adjudication is involved, the Supreme Court may require "adequate definition" by statute of the rights and duties involved.

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[154] Kentucky Commission on Human Rights v. Fraser, No. 80-SC-633-DG, slip op. at 5-6.

[155] The Court relied on the presence of "statutory guidelines" and subsequently on the fact that "prohibited conduct has been well defined by the governing statute." *Id.* at 6.